No. 11437

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GRIFFITHS AND SPRAGUE STEVEDORING COMPANY, INCORPORATED, a corporation,

Appellant,

vs.

WATERFRONT EMPLOYERS ASSOCIATION OF THE PACIFIC COAST, a corporation,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF

J. GORDON GOSE, of
McMICKEN, RUPP & SCHWEPPE,
657 Colman Building,
Seattle 4, Washington.

EDWARD M. HAY,
DAVID O. HAMLIN,
563 Colman Building,
Seattle 4, Washington.

Attorneys for Appellant.

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REPLY BRIEF

It is not appellant's purpose, in submitting this reply brief, to subject this court to a re-argument of the propositions which have already been fully stated in appellant's opening brief. It would not be proper to do so nor is such a course necessary. The irreconcilable contentions of the parties are squarely presented by their respective briefs already filed. The function of this reply brief will therefore be strictly limited to pointing out in the briefest manner possible certain fallacies in appellee's argument.

I.

The Fact That the Appellant May Have Received Substantial Benefits From Its Membership In the Appellee Corporation Has No Bearing On Any Question Here Involved.

Throughout its brief, the appellee repeatedly recurs to the proposition that appellant has received benefits from its membership in the appellee corporation and that it should, therefore, be obligated to pay the tonnage assessment. In this connection, appellee refers to a finding of the trial court that appellant would have been required to procure services of the character furnished by appellee, if appellant had not been a member of appellee, and that the expense to appellant in such case would have exceeded the amount of tonnage taxes which appellee seeks to collect (Finding No. 15, Tr. 40).

There is actually nothing in the record which shows in detail what it would probably cost appellant to provide itself with services such as those provided by appellee. It is apparent that a detailed inquiry into this subject would have been time consuming and to a large extent speculative. Appellant believes that in the present state of the record there is no real basis for such a positive finding of fact, but even if the finding is assumed, for the sake of argument, to be correct, the fact is so obviously immaterial as to render it of no moment whatsoever.

It is sought in this case to hold appellant for dues which are claimed to be owing from appellant by virtue of its membership in the appellee corporation. The ultimate question is whether appellant, by becoming

a member, assumed a status which subjected it to liability on account of the particular dues here involved. If so, appellant is liable without regard to the quantum of actual benefit received by it; if not, appellant is not liable even though it has benefited far beyond its expectations. To illustrate, take the case of a private club which has by-laws entitling its members to certain privileges upon the payment of fixed dues, of say, $10.00 a month. The by-laws having fixed the rights of the parties, it obviously is impossible for the club to disregard its by-laws and to evolve some other basis for dues and to justify its conduct in doing so by stating that the member has received benefits which exceed in value the amount sought to be collected from him. This would be nothing else than an attempt to vary the express contract of the parties by unilateral action.

As a member of appellee, the appellant has the right to insist that the appellee corporation operate in accordance with the full agreement of the parties. This agreement is contained in the articles of incorporation and the by-laws, as affected by the California statutes under which those articles and by-laws were adopted and by the requirements of public policy applicable thereto. No matter how much benefit appellant may have received, its liability cannot exceed what, if anything, it agreed to pay for those benefits. Appellee cannot enforce a dues program which either violates its by-laws, the California statutes or rules of public policy simply by saying that its charges are less in amount than the value of the benefits conferred. It must rather confine its dues program to

some course which meets its agreement and is not condemned by law.

We recognize, of course, that appellee denies that it has violated its agreement and the law applicable thereto, and, insofar as appellee confines itself to such denials, it addresses itself to the issues in this case. But when the appellee goes further, as it has done repeatedly in its brief, and challenges, upon the benefits received theory, appellant's rights to insist, as a member, that appellee conduct its business in accordance with law, then appellee assumes an utterly untenable position. It is too manifest for argument that this contention, if allowable, would permit the appellee to enforce almost any claim against appellant without regard to legal restrictions.

II.

The Fact That Appellant Has Paid Certain Amounts On Account of the Tonnage Taxes Has No Bearing On the Decision of This Case.

Another favorite statement of appellee is that appellant has, in some way, lost its right to challenge the legality of the appellee's dues program because appellant has paid some of these dues.

With respect to appellant's proposition that the appellee's dues program violates public policy, there can be no dispute that appellant's acquiescence is without effect. Partial or past performance of a contract which is contrary to public policy cannot so validate the contract as to justify a court in enforcing further performance.

Independent of the public policy question, it will be

recalled that in our opening brief we pointed out that in part, at least, appellant has been threatened with economic reprisals if it should fail to comply with appellee's demands. Payments made under these circumstances cannot prejudice appellant's position.

In addition to these specific features of payments made by appellant, it suffices to say that appellant has at no stage admitted its liability to pay the tonnage tax on Army cargo. The dispute on this point between appellant and appellee runs back to 1942 when Army cargoes first began to play a prominent part in appellant's business (Plf.'s Exhibits 19, 20, 22, Tr. 118, 121, 123). Appellant is thus entitled to challenge the validity of any claim for amounts yet unpaid.

III.

The Public Policy Argument

The arguments of the respective parties to this appeal upon the question of whether the appellee's dues program violates public policy simply represent two entirely different views of the law as announced by certain authorities common to both of the earlier briefs. It is for the court to determine which interpretation is correct upon its own examination of the decision. Any further argument by appellant as to the content of the cases would only be repetitive and burdensome to the court.

Appellee does, however, argue that the cases relied upon by appellant lose force because the Army contracts in the case at bar were negotiated contracts under the First War Powers Act, rather than contracts obtained on competitive bidding, and because

such contracts were subject to renegotiation by the government. This argument lacks validity for at least two reasons. First, the rules of the cases relied upon by appellant are not by their nature confined to contracts obtained on competitive bids. The competitive bidding device is used on public contracts for the obvious purpose of protecting the public interest. When, owing to the exigencies of war, it was necessary to let down the bars on the making of public contracts, the government substituted the device of renegotiation to protect the public interest. If it be assumed, as it must be under the authorities, that the courts are bound to give further protection to contracts obtained by competitive bidding in times of peace by refusing to enforce transactions which tend illegally to add to the cost of contracts so obtained, it must be equally true that the courts will do the same thing where the legislature in time of war has been compelled to introduce a substitute safeguard. The inherent principle of the cases is that the existence of legislative statutory safeguards does not end the matter but that the courts, under established principles of the common law, will further discourage raids upon the public treasury by refusing to enforce collateral arrangements of private parties which add to the cost of public contracts.

Second, if the factor of competitive bidding really were of any consequence, it does appear from the uncontradicted testimony that competitive bids were made as a basis for the so-called "negotiated contracts" between appellant and the Army (Tr. 596, 597).

IV.

The Lack of Uniformity Argument

In answering appellant's argument upon the proposition that the tonnage tax is not uniform as required by California statute, the appellee argues at some length by analogy to tax cases. No such analogy can be legitimately made. The status of members of a non-profit corporation like that of stockholders in a business corporation is determined by the structure of the corporation and by what the authorizing statute permits. The Articles and by-laws, to the extent permitted by statute, constitute a contract between the members of a non-profit corporation. Tax laws, on the other hand, rest on no element of contract but upon legal and historical bases utterly different from laws affecting corporations. This distinction is too obvious and elementary to require exposition. Any effort to determine the contractual rights of a member or shareholder of a corporation by comparing his status to that existing between a taxpayer and the sovereign can lead only to confusion.

The basis for appellant's argument upon want of uniformity is the California statute, which appellee largely ignores. We think it manifest that the dues program violates the requirements of that statute for the reasons already fully stated in our opening brief.

V.

Do the By-Laws Permit Any Form of Dues to Be Levied Against Associate Members?

In answer to appellant's argument that the by-laws do not permit imposition of any dues upon asso-

ciate members, the appellee says that the particular by-laws which concern dues are unambiguous and that other portions of the by-laws and the practical interpretation of the parties cannot be looked to for purposes of construction. If the by-laws specifically pertaining to dues were unambiguous in their terms, we would certainly agree with the appellee's contention. As pointed out in our opening brief, ambiguity is the rule rather than the exception in all of the acts of the appellee corporation, and this statement is most demonstrably true as to the by-laws which pertain to dues.

Take Article XVI (Tr. 72) of the by-laws quoted by appellee in its brief as an example. It reads in part thus:

> "In fixing all dues and levying all assessments, the Board of Directors shall determine the amount to be paid by each member per ton of cargo loaded and/or discharged at each United States Pacific Coast port (except Alaska ports) * * *."

Can anyone possibly say, in light of all the facts of this case, what that provision means without resort to extrinsic evidence which will permit some interpolation of additional language?

As the language stands, it can be argued that each member can be called upon to pay some stated amount multiplied by the total cargo passing through all the ports of the Pacific Coast, even though such member had nothing whatsoever to do with such cargo. Neither party contends that this literal interpretation of the language has ever been employed. The appellee's posi-

tion in this case requires that the words "by such member" or their equivalent be read into the clause following the words "loaded and/or discharged." The appellee's assertion that the clause is unambiguous is thus refuted by the necessities of its own position.

But if we go along with appellee and aid its "unambiguous" by-law by inserting words which give it a meaning more nearly approaching appellee's theories, we simply develop a secondary ambiguity. What do the words "loaded and/or discharged by such member" mean when applied to the case where the vessel belongs to a voting member and the work is being done by an associate voting member. The appellee's president, Mr. Foisie, recognizes that the owner voting member in such case would say that it was "loading or discharging cargo" and that the associate member would say the same thing (Tr. 429, 430). Are both then to pay the tax under this "unambiguous" by-law which we have already assisted by the addition of clarifying words? Not so, says the resourceful Mr. Foisie. The tax is to be paid but once by one or the other of the parties as they shall agree between themselves (Tr. 431, 432). So now we must give this crystal clear "unambiguous" by-law a little more help and add some more words such as the following: "Provided, that where a vessel owned or operated by a voting member steamship company is loaded by an associate member stevedoring company the assessment shall be payable but once and by such of the two members as they shall mutually agree."

But when we have done this to the "unambiguous" by-law, what happens if neither member pays? Do we

now have a joint and several liability or what? The record does not give any explanation of this problem, but appellee asserts that the by-law is "unambiguous" and needs no aid by way of interpretation.

The ambiguity of the by-laws with respect to dues are thus so patent as to leave no alternative to a resort to external evidence, including the remaining by-law provisions and the practical interpretations given thereto. As developed in our opening brief, the by-law provisions on dues were clearly interpreted by the parties so as to impose dues liability on voting members only. Only by a special written consent incident to the May 9, 1940, resolution (Tr. 101 to 103) were associate members made liable, and then only as to cargo handled for "non-member steamship companies," a category that cannot be stretched to include the Army.

To avoid repetition, we refer to pages 36 to 42 of appellant's opening brief, where the argument upon construction of the by-laws is fully developed.

VI.

The Resolutions Levying the Tonnage Tax Have Never Been Approved By the Members

In answering appellant's argument that Article IV, subsection (f) of the by-laws (Tr. 59) requires that the members "at a regular or special meeting" fix a maximum rate as a condition precedent to any levy of dues by appellee's directors, appellee states, among other things, that the first resolution levying dues was "confirmed in writing by the membership." Not only was this confirmation applicable to the then rate of two cents per ton, but admittedly no vote called for by the by-law was taken at "a regular or special meeting." There has thus been no compliance with the by-law. It is a fundamental principle of the law of corporations that action required to be taken at a corporate meeting cannot be accomplished by independent individual action of the members when not in meeting assembled.

Appellee also seeks to go back to the point made by it at the trial that appellant cannot raise this point because, in response to a request for admission, appellant admitted that the various tonnage tax resolutions were "duly adopted" (Tr. 13 to 20). But in the language of appellee's own complaint, it is alleged that the tonnage taxes were duly levied and assessed "pursuant to the by-laws" (Tr. 3). The appellant has never admitted adoption in accordance with the by-laws, the "duly adopted" admission having reference obviously to the counterpart of that phrase as used in appellee's complaint. The deliberate omission to call for an admission of adoption *pursuant to the by-laws* clearly

must be interpreted to mean that appellant was not being asked to admit that the by-law requirements had been met, especially since appellant had by certain affirmative defenses set up non-compliance with the by-laws as a defense (Tr. 7, 8).

CONCLUSION

Appellant reserves for oral argument any phase of appellee's brief which has not been specifically dealt with herein.

Respectfully submitted,

J. Gordon Gose, of
McMicken, Rupp & Schweppe,
657 Colman Building,
Seattle 4, Washington.

Edward M. Hay,
David O. Hamlin,
563 Colman Building,
Seattle 4, Washington.
Attorneys for Appellant.